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91-1142

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LARRY FELDMAN,
A/K/A/ LARRY FLEMING,
A/K/A/ LARRY GIVNER,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER
LAW OFFICES OF
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600 S. MCDONOUGH STREET
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QUESTION PRESENTED

Whether the Court should set a definable standard by which to measure outrageous government conduct in the prosecution of criminal defendants when challenges are made that the conduct is so egregious as to deny a defendant due process?

THE PARTIES

The caption in this case contains the name of all parties.

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V.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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REFERENCE TO OPINIONS DELIVERED BELOW

1. At the close of the government's case, Petitioner moved for a judgment of acquittal on each count. (R7-947). The Motion for Judgment of Acquittal was denied on Counts 3 and 4 and granted on Count 16. (R7-965). One of the reasons for the Motion for

Judgment of Acquittal was based on government misconduct.

2. On December 8, 1989, the U.S. District Judge denied Defendant's Motion for New Trial which included, as a basis, a challenge that the government's conduct in the prosecution of the case was so outrageous as to warrant a new trial and dismissal of the charges. The order denying the motion is attached as Appendix "A".

3. The United States Court of Appeals for the Eleventh Circuit issued an unpublished opinion affirming the District Court's order on July 5, 1991, attached as Appendix "B".

4. The United States Court of Appeals for the Eleventh Circuit issued an unpublished order denying rehearing and rehearing en banc on September 12, 1991, attached as Appendix "C".

JURISDICTION

On July 5, 1991, the United States Court of Appeals for the Eleventh Circuit affirmed the orders of the United States District Court for the Southern District of Alabama. On September 12, 1991, the United States Court of Appeals denied Rehearing and Rehearing En Banc. This Petition is filed within 90 days of said date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1) and Rule 13, Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTORY PROVISIONS INVOLVED

1. 21 U.S.C. 841 (see Appendix "D").

2. 21 U.S.C. 846 (see Appendix "E").

STATEMENT OF THE CASE

On June 1, 1989, a superseding indictment was filed in United States District Court for the Southern District of Alabama, Southern Division, charging 24 Defendants in an 18-count indictment for violation of various drug laws. Petitioner was charged in four of the counts. (R1-1-1). Petitioner's trial was severed from the other co-defendants. (R1-15-1).

On November 17, 1989, the jury returned a verdict of guilty only as to Count 4 of the indictment (21 U.S.C. 841(a)(1), 841(b)(1)(A)(ii)(II), 841(b)(1)(A)(vii) and

846; Conspiracy to Possess with Intent to Distribute Cocaine and Marijuana). (R8-1126) (R1-24-1).

On February 1, 1990, Petitioner was sentenced pursuant to the sentencing guidelines to a term of imprisonment for a period of 235 months without parole. (R1-42-1) (R8-1189, 1190).

Motion for Judgment of Acquittal and Motion for New Trial was filed in the District Court on November 27, 1989 an denied on December 8, 1989. Notice of appeal to the United States Court of Appeals for the Eleventh Circuit was filed on February 7, 1990. Jurisdiction before the Court of Appeals was invoked pursuant to 28 U.S.C. 1291, 28 U.S.C. 1294 and Rule 4, Federal Rules of Appellate Procedure. The Court of Appeals affirmed the decision of the District Court on July 5, 1991. Petitioner's Rehearing and

Rehearing Request En Banc was denied on September 12, 1991.

The Richard Lynn organization began importing marijuana in the Bahamas-Florida Keys-Miami area prior to 1979. In 1982 or 1983, the organization switched to cocaine. In 1983 or 1986, they moved the operation to the Demopolis-Perry County, Alabama area. (R3-90 through 96), (R5-495,496).

The Lynn organization was like a courier service the purpose of which was to import cocaine and not to distribute it. (R3-180,181).

In an unrelated case, the government began utilizing a cooperating defendant, Michael Golden, in cases in Southern Florida. Golden was in trouble and sought to aid the government in exchange for leniency.

Golden (who used a number of aliases) had been arrested on November 21, 1988, in

Portland, Maine. He then agreed to cooperate with the Drug Enforcement Administration (D.E.A.). He then went to Miami and tried to work a deal to set up Petitioner[1]. (R6-737,741). The initial plan of the investigation was for the confidential informant (Golden) to purchase drugs from the Petitioner. When this didn't work out, they took a different approach. The informant (Golden) attempted to sell cocaine to the Petitioner. Neither approach worked out. The Petitioner never sold Golden anything nor purchased any drugs from him. (R6-632).

Golden made a number of tapes of his conversations with the Petitioner. (R6-653).

In June, Golden was under pressure to get a deal going with the Petitioner. (R7-897, 905, 908). Golden was involved in an

[1]Petitioner lived in Miami, Florida; at all relevant times was in Miami; and never entered the State of Alabama.

undercover capacity with the Petitioner from December 7 to July 14. He had contact with Petitioner some 53 days. (R7-914).

During the trial of the case, it was revealed that Golden so mistrusted the Agents of the D.E.A., and they so mistrusted him that both kept respective diaries of their dealings with each other (see Appendix "F" which is attached hereto and contains a status of court exhibits some of which were filed under seal - Court Exhibits "1", "2", and "3"). It was through a review of these documents at trial that the Petitioner learned of the government's gross misconduct in handling the informant in this case and the crimes that the government participated in which were outside of the instant offense.

After the Petitioner's arrest, he gave a statement to D.E.A. Agent Jay Bergman adamantly attesting to his innocence in the

Alabama case. Specifically, the Petitioner stated that he was not involved in the Alabama case. He also stated that he would cooperate with the Government in other matters. (R5-589).

During the trial of the case, the government produced to defense counsel Golden's diary containing his thoughts and impressions concerning certain events which occurred subsequent to his own arrest and during his work in an undercover capacity for the government. These notes are provided in full as "Court Exhibit 2". (See Appendix "F" for status of Exhibit). The notes revealed that informant Golden had control of D.E.A. Agent Jay Bergman. The notes also revealed that the D.E.A. had condoned and facilitated Golden's criminal conduct while he was working for the government in order that he might subsidize his income. The notes revealed that

the D.E.A. pressured, threatened, intimidated, and enticed informant Golden to such an extent that his entire testimony was tainted. Golden's notes documented outrageous conduct on the part of the government in this case. (R7-818).

As a result of the above, the Petitioner raised the issue of D.E.A. misconduct at the trial court level during the trial, as well as after the trial, in his Motion for Judgment of Acquittal or in the Alternative for a New Trial which was filed on November 27, 1989, and also in his supplement to said motion which was filed on or about November 29, 1989. (R1-26, 27) (R7-966-67). The trial court entered an order denying the Petitioner's motion on December 8, 1989. (R1-29).

The D.E.A. had notice of Golden's lack of credibility. This was based on his prior participation in illegal drug importation and

distribution activities, his heavy prior drug usage, his prior fugitive status, and his prior connections with Colombian drug lords. Agent Bergman admitted at trial that standard practices and procedures were not followed by him and other D.E.A. agents in handling Michael Golden. (R6-624).

The lack of supervision of the informant is evidenced by the testimony concerning the theft and conversion of the Petitioner's check for $20,500 by the informant (Golden) which was the proceeds of an inheritance from the estate of the Petitioner's mother. Petitioner was having difficulty cashing the inheritance check and Golden saw an opportunity to supplement his otherwise bleak financial situation by stealing the check from the Petitioner. D.E.A. Agent Bergman knew that Golden falsely endorsed the check, after the Petitioner endorsed it at the request of

Golden. (R6-718). Golden saw the check 18 days before the Petitioner was arrested on June 14, 1989. (R7-799). When the D.E.A. learned about the existence of the check, they saw it as a perfect opportunity to identify the Petitioner. (R7-798). However, Golden's notes reveal that they had enough information necessary to identify the Petitioner on April 11, 1989, after being apprised of his birthday. (See Appendix "F" for status of Court Exhibit 2, April 11 Entry). The original plan was that the check would be deposited into a bank account using a D.E.A. operative with connections in a local Miami bank. However, as matters turned out, the D.E.A. was unable to do this. (R7-800). According to Golden, the Petitioner gave him the check and told him to see what he could do with it. (R7-885). With the D.E.A. agent's knowledge, Golden took the check to his

attorney, Joel Magazine, who called Agent Bergman to inquire as to whether the proceeds of the check had anything to do with drug transactions. (R7-800-801). Agent Bergman told Magazine that the check was legitimate. (R7-801-802). Golden endorsed the check in the presence of Magazine with his undercover alias of Michael Milar. (R7-803).

It was clear from the testimony of Golden that he was desperate for money. (R7-840). Golden's personal notes reveal that he was worried about paying his bills and was advised by the D.E.A. that they could not help him with expenses and that he could not work another job while working with them because all of his time would be taken up with the D.E.A. (See Appendix "F" for status of Court Exhibit 2, February 19 Entry). The D.E.A. was going to request transportation for him once he succeeded so he could continue working for

them. (See Appendix "F" for status of Court Exhibit 2, February 28 Entry). Golden's notes reveal that he was totally out of funds on May 1, 1989, and that he first learned of the Petitioner's legitimate inheritance check on May 3, 1989. (See Appendix "F" for status of Court Exhibit 2, May 1 and 3 Entries). Neither Golden nor his wife were employed. (R7-841). In fact, Golden asked Agent Bergman to pay for the cost of placing his daughter in private school. (R7-926). Further, Golden had tried to sell his wife's diamond at a restaurant while he was having dinner with the Petitioner and Petitioner's sister. (R7-927). Golden also asked the Petitioner for a loan. (R6-754).

Golden's notes revealed further that he talked to D.E.A. Agent Bergman about "ripping off" Petitioner of his money. Golden's explanation of these notes was that the term

"rip off" was what he meant by a government seizure of drug assets and that the discussion of "ripping off" the Petitioner referred to the money Petitioner was going to pay Golden for a future drug transaction. (R7-869). Golden's notes from May 19, 1989 stated that he met with Agent Bergman to discuss the "rip off". (R7-886-887). The drug transaction that Golden was referring to had fallen apart on May 16, 1989. In addition, Agent Bergman's notes from May 19, 1989 had no entries concerning this meeting. The "rip off" referred to Golden stealing the Petitioner's legitimate inheritance check and condonation and participation in the same by D.E.A. agents and the informant's attorney, Joel Magazine.

When Agent Bergman learned that Golden had taken the check to his attorney, Joel Magazine, Bergman did not think that the attorney would steal it. (R6-610). Agent

Bergman thought that the money was still in escrow. (R6-612). Joel Magazine testified that the check was deposited into his ordinary account, not his trust account, in payment for a fee. (R7-990). Agent Bergman never asked Attorney Joel Magazine to turn the money over to him even though he knew Golden had given it to him. (R6-717).

Petitioner, while at MCC, Miami, filed a theft report and reported the theft of his check to Metro Dade Police Detective Broggassa. (R7-976). Broggassa testified that he spoke with D.E.A. Agent Bergman about the theft. (R7-977). Agent Bergman admitted that he lied to Broggassa about Golden and discouraged Broggassa from pursuing the investigation further. (R6-647).

Golden testified to the fact that he had a serious personality conflict with Richard Holmes, Miami D.E.A. Group Three Supervisor.

(R7-878). Informant Golden's notes further revealed that Agent Holmes threatened Golden with physical violence. (R7-878). Informant Golden's notes revealed that Holmes told him he would be in good shape if he pulled off an undercover operation with the Petitioner and if he did not he would wish he was in jail before he got through with him. (See Appendix "F" for status of Court Exhibit 2, March 22 Entry). Golden stated that if the Petitioner was not arrested with his assistance that the Supervisor would not let Agent Bergman say anything good about Golden at sentencing. (See Appendix "F" for status of Court Exhibit 2, June 5 Entry). Agent Holmes told the informant Golden that he had better get the Petitioner. (R7-879). Agent Holmes also told the informant (Golden) he was going to physically harm him. Agent Holmes told Golden that he should call the Petitioner and not

tape the conversation in order to be able to say anything that he wanted to say and to talk the Petitioner into doing something with Golden. Golden stated that he refused to tape record conversations selectively. (R7-880). Golden only produced 12 tape recorded conversations from over fifty meetings and telephone conversations over a period of some six months (between December, 1988 and June, 1989). (R7-657). Golden admitted on the stand for the first time that he had taken a silver bar worth several hundred dollars from the Petitioner just before he was arrested. (R7-936).

ARGUMENT

This case provides an opportunity for this Court to establish a definable standard by which governmental misconduct may be measured. The Circuit Courts throughout the country have adjudged cases individually never

setting a measurable standard to address what constitutes outrageous government conduct in cases where due process challenges are levied on behalf of criminal defendants.

The evidence in this case was insufficient to prove that Petitioner was involved with the Lynn organization. Michael Golden was recruited as a government witness after he had been charged with certain criminal violations in jurisdictions other than the Southern District of Alabama. Informant Golden's testimony was essential for the government to convict Petitioner. Without his testimony, a conviction would not have been possible. Petitioner submits that the manner in which this informant's testimony and cooperation was elicited, the manner in which he was handled and supervised by the government, and the government agents' complicity and condonation of certain crimes

outside the offense charged, is so outrageous as to bar the conviction of Petitioner on the basis of a due process violation. Setting a measurable standard of what is outrageous and an exercise of the Court's supervisory power is required in cases of governmental misconduct. As in United States v. Ward, 699 F.2d 1315 (11th Cir. 1983), this Petitioner's conviction is constitutionally deficient due to the presence of outrageous governmental misconduct in securing the same.

Participation of the government in crimes in conjunction with the defendant in order to encourage crime or participation of the government in crimes which were "independent of the crimes committed," is reprehensible and warrants reversal. United States v. Archer, 486 F.2d 670 (2nd Cir. 1973). In the case at bar, as in Archer, supra, the government participated with Golden in the theft of

property from Petitioner which is independent of the crime allegedly committed. Standards governing governmental misconduct are essential, particularly in an age of decreasing judicial supervision over the criminal justice system and increasing supervision over all other aspects of government. The job of the prosecution is to seek justice.

The Eleventh Circuit's per curiam affirmance (without opinion) of the decision of the District Court on the governmental misconduct issue in this case raises an obvious problem. The Court's failure to address the gross and blatant governmental misconduct in this case serves to perpetuate the problem and leaves void a definable standard of review to designate the limits to which this Court is willing to permit law

enforcement and the government to go in obtaining a conviction.

In this case, as in United States v. Haimowitz, 725 F.2d 1561, 1577 (11th Cir. 1984), the absence of a standard of review on the misconduct issue is obviously necessary. Neither the Supreme Court nor the Fifth nor Eleventh Circuits has ever reversed a case on the ground of government misconduct. Judge Easterbrook in United States v. Miller, 891 F.2d 1265 (7th Cir. 1989), joining in the Court's opinion and adding a concurrence, noted that "there is no agreement as to what is outrageous, that judges would vote their lower intestines, and that such a meandering, personal approach is the antithesis of justice under the law, and ought not be indulged."

Judge Frank Johnson, dissenting in United States v. Tobias, 622 F.2d 381 (5th Cir. 1981), addressed the improper practice of

courts carte blanche tolerance of governmental involvement in criminal activity by stating:

> Courts are rightfully loathe to overturn convictions on the basis of governmental over-involvement in the commission of a crime recognizing that law enforcement officials need wide latitude in devising appropriate method and tactics for apprehending violators. However, judicial tolerance of governmental involvement in criminal activity should not constitute a carte blanche; there is still a point beyond which law enforcement officials cannot go. As Justice Brandeis observed, "[t]o declare that in the administration of criminal law the end justifies the means - to declare that the government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution." Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944 (1927) (Brandeis, J., dissenting). The direct continual involvement by government agents in the creation, maintenance and commission of a crime, to the extent reflected in this case, goes beyond the perimeter of permissible conduct and should not be countenanced by this Court.

Id. 662 F.2d at 393. See also, United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978).

Both Twigg and Archer, supra, illustrate that even in cases where defendants may be predisposed to commit crimes, dismissal may be warranted in those rare cases where the government's conduct is so outrageous.

The importance of the governmental misconduct issue and the need for an equitable measurable standard by which to evaluate the misconduct has been recognized for years. This is evidenced as noted by Justice Brandeis in his dissent in Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 574, 72 L.Ed. 944 (1927), wherein it is stated:

> "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds

> contempt for law; it invites every man to become a law unto himself; it invites anarchy..."

This Court, however, focused in for the first time that police conduct may rise to a level of outrageousness which should bar prosecution in United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). This Court in Russell, supra, stated:

> [W]e may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction.

The Circuit Courts have reversed convictions based on the misconduct issue for different reasons. This is obvious in Twigg and Archer, supra, as well as other cases cited throughout this petition. Although the Ninth Circuit suggests that a defendant's predisposition to commit a crime is irrelevant to the issue of outrageous government conduct,

in its decision to reverse (see, United States v. Gonzales-Benitez, 537 F.2d 1051 (9th Cir.) cert. denied, 429 U.S. 923, 97 S.Ct. 323, 50 L.Ed.2d 291 (1976); see also, United States v. Pacheo-Ortiz, 889 F.2d 301 (1st Cir. 1989), the case law is inconsistent and incomplete as to exactly what constitutes outrageous government misconduct.

Elements and a uniform standard of review are necessary to guide law enforcement officers and prosecutors as well so as to ensure equitable treatment of defendants prosecuted in the various Circuit Courts. Without a standard the government will continue to be unguided when stepping beyond the bounds which safeguard criminal defendants' rights to due process.

The use of Golden's testimony to link Petitioner to the Alabama charges was prejudicial to Petitioner's due process

rights. Absent his testimony, the Petitioner would not have been convicted. The Eleventh Circuit's failure to articulate the standard against which the government's conduct was measured in this case leaves open the possibility for a complete denial of Petitioner's right to due process and in the future invites the government to engage in conduct contrary to that required by fundamental fairness principles.

CONCLUSION

This case presents for this Court an opportunity to present a host of Circuit Courts with guidelines and a measurable standard by which challenges to government and law enforcement misconduct may be evaluated. Circuit Courts have historically voted their conscience in these cases and disparity among offenders throughout the country on this issue is obvious. Petitioner is requesting that

certiorari be granted in the instant case because the issue raised herein is of such importance that failure to grant certiorari will serve only to perpetuate the existence of disparity between cases as certain cases may strike a sympathetic cord in some instances and not others, may be repugnant to some objective reviewers and not others, and leaves void a measurable standard of what constitutes government misconduct rising to a level of outrageousness for which government agents should strive to avoid.

The Petitioner has been denied due process and a fair trial in this case as evidenced by the facts presented in his Petition for Certiorari. The Circuit Court's failure to even address this in its opinion, affirming the District Court's opinion, serves to frustrate any notion of fundamental fairness in this case because it fails to

address a definable standard by which the conduct complained of in this case can be measured. The standard upon which the Circuit Courts continue to rely in measuring claims of outrageous government conduct are fundamental fairness and conduct which shocks a universal sense of justice mandated by the Due Process Clause of the Fifth Amendment. United States v. Ofshe, 811 F.2d 1508 (11th Cir. 1987. This nebulous and vague standard leaves far too much to chance when balanced against the need for honesty and accountability of government agents in a time of diminished judicial supervision.

This case has far-reaching implications for the future of criminal defendants, and it is respectfully suggested that this Court grant certiorari in order to set a specific standard of review by which law enforcement practices may be measured when defense

challenges are levied in cases purported to represent grossly outrageous government misconduct as in Petitioner's case.

Dated this 11th day of December, 1991.

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600 S. McDonough St.
Montgomery, AL 36104
205/269-3330

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	**CRIMINAL ACTION**
	)	**NO. 89-00072-AH**
LARRY FELDMAN, a/k/a LANCE FLEMMING, a/k/a LARRY GIVNER	)	

ORDER

This cause is before the Court on defendant's motion for judgment of acquittal or in the alternative for a new trial, (Doc. #26), and supplemental motion for judgment of acquittal or for a new trial. (Doc. #27). After due and careful consideration of defendant's motions, and having heard the evidence presented at trial, the Court concludes that defendant's motions are due to be, and hereby are, DENIED.

DONE this 8th day of December, 1989.

/s/ Alex T. Howard, Jr.
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX B

DO NOT
PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 90-7125

D. C. Docket No. CR 89-000720-AH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY FELDMAN, a/k/a/
LANCE FLEMING, a/k/a/
LARRY GIVNER,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama

July 5, 1991

Before FAY and DUBINA, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1.

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*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

Judgment Entered: July 5, 1991
By the Court: Miguel J. Cortez, Clerk

By: /s/ David Malaud
Deputy Clerk

ISSUED AS MANDATE: OCT 11 1991

October 11, 1991

Jeffery D. Duffey
Attorney at Law
600 South McDonough Street
Montgomery AL 36104

RE: 90-7125 USA v. Feldman
Dist. Ct. No. - 89-00072CR-AH

Other addressees: Susan Graham James
John V. O'Brien
J.B. Sessions III
Gloria A. Bedwell
Kristi D. Lee\G

APPENDIX C

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

SEP 12 1991

MIGUEL J. CORTEZ
CLERK

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-7125

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY FELDMAN, a/k/a
LANCE FLEMING, a/k/a
LARRY GIVNER,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Alabama

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion July 5, 1991, 11th Cir., 19__, ___F.2d ____).

Before: FAY and DUBINA, Circuit Judges, and

ESCHBACH*, Senior Circuit Judge.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

signed
United States Circuit Judge

*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation

ORD-42
(9/90)

APPENDIX D

Section 841. Prohibited acts A

(a) **Unlawful acts.** Except as authorized by this title, it shall be unlawful for any person to knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) **Penalties.** Except as otherwise provided in section 405 [21 USCS Section 845], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of

imprisonment or not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special

parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4), (5), and (6) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for

an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4

years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in

addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine or not more than $10,000, or both.

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsection (a) and (b) of section 404 [21 USCS Section 844(a), (b)].

(5) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, except as authorized by this title, phencyclidine (as defined in section 310(c)(2) [21 USCS Section 830(c)(2)]) shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable

under paragraph (1) of this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana,or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(6) In the case of a violation of subsection (a) involving a quantity of marihuana exceeding 1,000 pounds, such person shall be

sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this title, title III, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.

(c) **Special parole term.** A special parole term imposed under this section or section 405 [21 USCS Section 845] may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period

of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 405 [21 USCS Section 845] shall be in addition to, and not in lieu of, any other parole provided for by law.

(d) **Piperidine offenses and penalty.** Any person who knowingly or intentionally --

(1) possesses any piperidine with intent to manufacture phencyclidine except as authorized by this title, or

(2) possesses any piperidine knowingly, or having reasonable cause to believe, that the

piperidine will be used to manufacture phencyclidine except as authorized by this title,

shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both.

APPENDIX E

Section 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

APPENDIX F

Informant Golden's notes and D.E.A. Agent Bergman's notes were filed with the Court as Court Exhibits. Informant Golden's notes were filed under seal.